Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

MARILYN K. DUPREE, aka MARILYN K. TAYLOR,
Petitioner,

v.

STATE OF OREGON, by and through its
DEPARTMENT OF TRANSPORTATION, Respondent.

On Petition for a Writ of Certiorari to
the
Court of Appeals of Oregon

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. In a partial taking of land, may the condemnor escape paying just compensation by asserting that limitations on the use of the remaining property resulting from the taking could have been theoretically imposed prior to the taking, had the condemnor chosen instead to exercise its police power?

2. Does the Just Compensation Clause require that in a partial taking of land which expressly condemns preexisting access rights, the jury consider the suitability of the remaining access in setting compensation?

PARTIES

The parties to this petition are:

Petitioner: Marilyn K. Dupree, aka Marilyn K. Taylor

Respondent: State of Oregon, by and through its Department of Transportation

There are two parties to the case who did not participate in the appeal and who are not expected to participate in the petition. Petitioner will serve these parties in the interest of due process. They are:

Defendants below: Damien Dupree
Key Bank of Oregon

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

MARILYN K. DUPREE, aka MARILYN K. TAYLOR,
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v.

STATE OF OREGON, by and through its
DEPARTMENT OF TRANSPORTATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF OREGON

Marilyn K. Dupree, aka Marilyn K. Taylor, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Oregon in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of Oregon is reported at 154 Or. App. 181, 961 P.2d 232 (1998). The Court of Appeals denied reconsideration without opinion in an unreported order. The Supreme Court of Oregon denied review without opinion. 327 Or. 621, ___ P.2d ___ (1998).

BASIS FOR JURISDICTION

The opinion of the Court of Appeals of Oregon was entered on May 27, 1998. The Court of Appeals denied a timely petition for reconsideration on July 22, 1998. The Supreme Court of Oregon denied review on October 28, 1998.

This Court has jurisdiction under 28 U.S.C. § 1257. 28 U.S.C. § 2403 does not apply. In any event, the State of Oregon is a party to this proceeding.

RAISING OF FEDERAL QUESTION

At trial, federal questions were not expressly raised. Petitioner treated the case as primarily raising questions of fact. She did, however, request a jury instruction on just compensation which quotes Bauman v. Ross, 167 U.S. 548, 574 (1897). Defendants' [sic] Requested Jury Instructions 1;[1] compare Or. Unif. Civ. Jury Instr. 60.09 with Bauman, 167 U.S. at 574.

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[1] Citations to the record below, pending designation of a record in this Court, follow Oregon citation conventions. See Or. R. App. P. 5.20, Oregon Judicial Department Appellate Court Style Manual.

On appeal, Petitioner cited to federal authorities as part of her argument regarding determination of just compensation. Resp. Br. 21-22. She also raised a federal question as to whether removal of an access upon which highest and best use is dependent requires compensation for reduction of that highest and best use. See Resp. Br. 30.

The Oregon Court of Appeals did not discuss the federal issue. It did, however, surprise the parties in its interpretation of State law. The Court of Appeals' reasoning relied heavily on unbriefed authority.

In her petition for reconsideration in the Court of Appeals, which was denied without opinion, Petitioner did not raise federal questions. Under Oregon law, however, this did not waive raising new issues in the Supreme Court of Oregon. Compare Or. R. App. P. 6.25 (procedure for reconsideration in Court of Appeals) with Or. R. App. P. 9.07 (grounds for granting review).

In her petition for review in the Supreme Court of Oregon, which was also denied without opinion, Petitioner cited federal authority on the definition of highest and best use as a description of the character of land, as opposed to value. Pet. for Rev. 12 n. 3. She also raised, in light of evidence that new application of access permit requirements reduced access to an inadequate level to maintain the previous highest and best use, whether the regulation constituted a taking under First English Evangelical Lutheran Ch. v. Los Angeles County, 482 U.S. 304 (1987). Pet. for Rev. 14, 15.

Finally, Petitioner also asked whether the Oregon rule that the police power may permit the State to reduce access without limitation or compensation, as held by the Court of Appeals, might conflict with federal law. Pet. for Rev. 17.

CONSTITUTIONAL PROVISIONS INVOLVED

"[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amend. V.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioner owned land, upon which a restaurant had been operated, fronting U.S. Highway 30 in St. Helens, Oregon.[2]

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[2] St. Helens is a city of approximately 8,000, located approximately 20 miles northwest of Portland, Oregon, on the Columbia River, and the seat of Columbia County. Highway 30 is the main highway through St. Helens and one of two major highways from Portland to the northern

In 1988, the State of Oregon, acting through its Department of Transportation, initiated a highway widening project in St. Helens. As part of the project, Highway 30 was designated under the Access Oregon Highway program and was redesignated a throughway through the area fronting Petitioner's land.[3]

On April 10, 1995, the State filed a complaint in eminent domain in the Circuit Court for Columbia County, Oregon, to condemn a 1,710 square foot portion of the land, fronting the highway, with a slope easement further burdening 840 square feet. The State also condemned, in the complaint, a building, trade fixtures, a sign, an awning, and, most significantly to this petition, preexisting rights of access to the highway at two points. It alleged compensation of $44,500. Petitioner, in her answer, alleged compensation of $175,000.

At trial, the State amended its pleadings to grant a permit for access at

Oregon coast.

[3]Under Oregon law, a throughway is equivalent to a limited access highway in other States. Or. Rev. Stat. § 374.010. Oregon does not distinguish divided and undivided throughways, apart from providing that throughways may be divided. Or. Rev. Stat. § 374.030(1). Highway 30, through the St. Helens area, is undivided.

one point, and Petitioner amended her claim for compensation to $106,000.

Under State law, a throughway may only be accessed pursuant to a permit. Or. Rev. Stat. § 374.305. Access Oregon Highways require similar restrictions. A permit was not granted Petitioner until the last day of trial. In any event, Petitioner presented evidence that the reduced access was insufficient to maintain her previous highest and best use (restaurant). Her experts presented their valuations accordingly.

The trial court instructed the jury that reduced access could not, by itself, be used as a basis to determine compensation. Instead, the jury was instructed to consider the effect of reduced access on highest and best use, in order to determine damages to the remainder.

The jury found just compensation to be $94,215. Under Oregon law, Petitioner was the prevailing party at trial, and she was subsequently awarded substantial costs and attorney fees under Or. Rev. Stat. § 35.346.

The State appealed, arguing that the only means by which the jury could have awarded the compensation it did was if the reduction in access had been considered in valuation. App. Br. 21-22. The State also argued that as a matter of law, reduction of access could not be considered in any way in determining compensation. Therefore, the State argued, because it could have reduced the access without condemnation, it was allowed to treat access as though it were

reduced in the condemnation. App. Br. 20-21.

Petitioner argued in response that the compensation was required in this case because it presented an actual taking of access rights, and that where there was a taking of access in a partial taking, it could be considered in determining severance damages. She also argued that the concepts of value and highest and best use were distinguishable, and that where the access taken in a partial taking affected the highest and best use, that should be considered in determination of compensation.[4] Resp. Br. 26-32.

The Court of Appeals of Oregon reversed and remanded. 154 Or. App. 181, 961 P.2d 232 (1998). It held that the fact that the State had not previously regulated access was a "fortuity", and that therefore the change in highest and best use resulting from the change in access was not compensable.[5]

The Court of Appeals denied reconsideration without opinion, and the Supreme Court of Oregon denied review without opinion. 327 Or. 621, ___ P.2d ___ (1998).

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[4]Petitioner also argued that Or. Rev. Stat. § 374.055 required consideration of access in determining severance damages. Resp. Br. 24 n. 13. This argument not at issue here.

[5]It also rejected Petitioner's statutory argument.

REASONS FOR GRANTING THE PETITION

This case essentially raises the question, "When is a taking not a taking?" The answer, according the Oregon Court of Appeals, is when a State has the unexercised authority to achieve the same result through regulation.

I. The Holding of the Court of Appeals of Oregon Conflicts with the Holdings and Principles of the Court of Appeals for the Third Circuit and Several State Courts.

This case provides the Court an opportunity to either resolve a conflict among several State courts, and the Court of Appeals for the Third Circuit, or, if the conflict proves a disagreement of State laws, to set a federal floor in an issue which by its very nature has a federal question lurking in the background.

The holding of the Court of Appeals of Oregon can be summed up in two alternate arguments: that when the State partially condemns property, access to the remainder is not considered in determining severance damages if the State had the inchoate power to achieve the same result regarding the access via regulation; and that replacing one access point, where the landowner had two before, after a partial taking which takes both access points, is just compensation as a matter of law, regardless of whether the remaining

access is sufficient to support the previous highest and best use.[6]

A substantial number of courts have come to a different conclusion, either in holding or principle. Generally, a taking of some, but not all, access, leaves a question of the reasonableness or suitability of the remaining access. E.g., Palm Beach County v. Tessler, 538 So. 2d 846 (Fla. 1989), State ex rel. Dept. of Hwys. v. Linnecke, 86 Nev. 257, 468 P.2d 8 (1970), Bruzzese v. Wood, 674 A.2d 390 (R.I. 1996). This is usually treated as a question of fact. E.g., United States v. Certain Land, 439 F.2d 670, 673 (3d Cir. 1971), Culley v. County of Elko, 101 Nev. 838, 711 P.2d 864 (1985), Narciso v. State, 114 R.I. 53, 328 A.2d 107 (1974). Suitability is generally considered relevant to a determination of highest and best use. E.g., Department of Trans. v. Shell Oil Co., 156 Ill. App. 3d 304, 509 N.E.2d 596 (1987) (expert testimony as to effect on service station); In re Condemnation by Commonwealth, Dept. of Trans., 93 Pa. Commw. 403, 501 A.2d 1172 (1985). Thus, several States have adopted an "all evidence" rule when the before and after method of valuation is used in severance damages cases. E.g., Potters II v. State Hwy. Comm'n, 608 So. 2d 1227, 1237 (Miss. 1992). And, as the New York Court of Appeals has noted, the concept of suitability is distinct from circuity of travel. An access can be circuitous, but

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[6]A third holding, negating a statutory argument, was based solely on State law.

may or may not prove unsuitable. Priestly v. State, 23 N.Y.2d 152, 295 N.Y.S.2d 659, 242 N.E.2d 827 (1968). The Oregon Court of Appeals, while citing a general suitability rule, short-circuited the analysis in this case by holding that one access was suitable as a matter of law.

There is a distinct conflict between the States on the fundamental question whether a reduction of access, therefore, presents a question of fact as to suitability. It is appropriate for this Court to either resolve the conflict or set a minimum federal standard. Therefore, Petitioner requests that this Court grant certiorari.

II. This Case Presents a Question of Public Import Regarding Valuation of Property Condemned by the Government.

> The defendants are entitled to receive the value of what they have been deprived, and nothing more. To award less would be unjust to them; to award more to them would be unjust to the state.

Bauman, 167 U.S. at 574.

The continued construction of highways and conversion of highways to limited access, by itself, strongly suggest that this case presents an issue

that will often reoccur.[7] Highways almost always cut across private land. It is very common that a taking to widen or convert a highway will result in a realignment of access to various properties, either by removal and reconfiguration of preexisting access, as in this case; closing of streets, cf., e.g., Saints Sahag and Mesrob Armenian Church v. Director of Pub. Works, 360 A.2d 534 (R.I. 1976) (interstate terminated a series of streets in downtown Providence); or occasionally altogether terminating access, cf., e.g., State, Dept. of Trans. v. Boagai, 509 So. 2d 471 (La. App. 1987) (interstate bisected parcel).

A great many landowners must give up interests in their property, often including access rights. This Court has not, however, indicated how the regulatory authority of the States affects just compensation when such access rights are taken. The Oregon

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[7]Indeed, the reported cases show many similar fact patterns. E.g., State ex rel. Hwy. Comm'n v. Jim Lynch Toyota, Inc., 830 S.W.2d 481 (Mo. App. 1992), transfer denied; Flynn v. State, 35 A.D.2d 690, 313 N.Y.S.2d 78 (1970); Matter of County of Rockland, 147 A.D.2d 478, 537 N.Y.S.2d 309, leave to appeal denied, 74 N.Y.2d 607, 545 N.Y.S.2d 103, 543 N.E.2d 746 (1987).

Court of Appeals has now said that the value of the access rights is zero, even without prior attempts to regulate.

Most landowners would be surprised to find that were their accesses to the nearest road suddenly reduced to a level which did not support the previous highest and best use, that the value of their property should remain the same. Their reasonable expectations that in the event of condemnation they would receive compensation relatively commensurate with fair market value, see Bauman, 167 U.S. at 574 (1897), are at risk.

This Court has seen fit in recent years to revisit some of the basic questions of eminent domain and inverse condemnation law, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). It is now an appropriate time for the Court to scrutinize whether, when an express taking does occur, the States and lower federal courts are awarding just compensation.

The matter is not confined to Oregon. At least one State Supreme Court has strongly indicated that it will usually deny compensation under similar circumstances to this case. State v. Schmidt, 867 S.W.2d 769 (Tex. 1993), cert. denied, 512 U.S. 1236, and cert. denied, 513 U.S. 842 (1994).

In light of the serious nature of the issue and the probability of reoccurrence, it is appropriate for the Court to grant certiorari. Petitioner so requests.

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III. The Opinion of the Court of Appeals of Oregon is Erroneous.

The Fifth Amendment states, simply, "[N]or shall private property be taken for public use, without just compensation." It is undisputed in this case that the State of Oregon took Petitioner's private property for use in a state highway. The property expressly taken included condemnation of two preexisting access points. Amended Complaint, ¶ 3. The Court of Appeals, however, essentially held that those access points and the abutter's easement of access recognized by Oregon law, State by State Hwy. Comm'n v. Burk, 200 Or. 211, 228, 265 P.2d 783 (1954), and cases cited, were not to be considered in determining compensation because a single access point was given in return -- despite evidence that that single access was inadequate for Petitioner's prior highest and best use and despite a substantial verdict.

The Court of Appeals based its ruling on the power of the State to regulate use of property despite the fact that Petitioner's use had never before been regulated and the regulations applied solely because the highway was being converted into a throughway. 154 Or. App. at 185, 186 n. 3, 961 P.2d at

234 n 3;[8] see Or. Rev. Stat. § 374.305(1).

This argument flies in the face of the clear command of the Constitution and of the general considerations of valuation of property. Property is not deemed worthless because the State has the power to regulate it. Where the police power is merely an inchoate factor, its potential effect, the Court may take notice, is taken into account in determining the value of the property.

It is well known that access strongly affects the viable use of a parcel. See, e.g., Loughry v. Cook, 263 S.W. 333 (Tex. Civ. App. 1924) (allowing, for misrepresentation, rescission of sale

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[8]The reference on page 186, n.3, of the Court of Appeals' opinion to a prior "holding" is a grievous misuse of the word. In Curran v. State by Dept. of Trans., 151 Or. App. 781, 951 P.2d 183 (1997), the same panel of the Court of Appeals that decided this case held that an alleged regulatory taking claim was not ripe, and stated in dictum that it did not believe the State was required to concede the question of whether a regulation preventing use of all reasonable access was a taking. 151 Or. App. at 785 n. 3.

of landlocked property); cf. Or. Rev. Stat. §§ 376.150-.200 (procedure for private action by landlocked landowner to obtain way of necessity).[9] Its value may decrease once the regulation is applied, but if the State chooses to condemn instead, as it did in this case, it must pay. The State cannot have it two ways.

In most cases, the Constitution also requires the State to compensate even for a regulation if all value is destroyed. Lucas. Thus, if the State had merely regulated the access points out of existence, it is possible that the State would have been required to compensate Petitioner. Whether the one access point given in return was adequate compensation is a question of fact which the jury answered, implicitly, in the negative.

The facts, quite simply, are that the State took the access points. The reduction in access, therefore, must be considered in determining severance damages. The Oregon courts have abandoned this principle. It is appropriate that this Court review the

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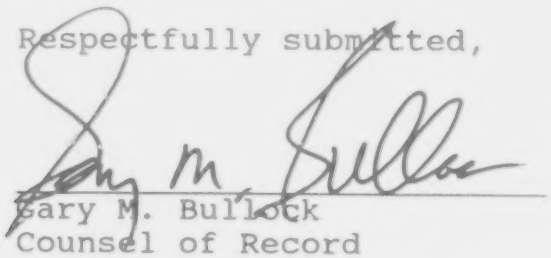
[9] Had the State not granted an access permit to Petitioner, a way of necessity to the highway still would not have been available. A prerequisite to obtaining a way of necessity is either that the road to be accessed be unlimited access or a permit for access be available. Or. Rev. Stat. § 376.180(7).

matter. Petitioner requests certiorari for this purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

Opinion, Oregon Court of Appeals

May 27, 1998

IN THE COURT OF APPEALS OF
THE STATE OF OREGON

State of Oregon,
by and through its
DEPARTMENT OF TRANSPORTATION,
Appellant,

v.

Marilyn K. DUPREE,
aka Marilyn K. Taylor,
Respondent,

and

Damien B. DUPREE
and Key Bank of Oregon,
an Oregon banking association,
Defendant.

(95-2064; CA A94440 (Control) and CA A94890)
(Cases Consolidated)

Appeal from Circuit Court, Columbia County.

Ted Grove, Judge.

Argued and submitted April 21, 1998.

Mary H. Williams, Assistant Attorney General, argued the cause for appellant.

With her on the brief were Hardy Myers, Attorney General, and Virginia L. Linder, Solicitor General.

Wade Regier argued the cause for respondent. With him on the brief were Gary M. Bullock and Bullock and Regier.

Before Edmonds, Presiding Judge, and Landau and Armstrong, Judges.

ARMSTRONG, J.

Reversed and remanded.

ARMSTRONG, J.

The state appeals from a judgment on a jury verdict that awarded defendant $94,215 as compensation for property that the state took to widen a highway.[1] The state argues that the trial court erred when it denied, in part, the state's motion for a peremptory instruction on the award of compensation to defendant for a change in her access to the highway and when it instructed the jury that it could consider the change in access in determining the compensation due defendant.[2] We reverse.

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[1]The state joined three defendants in the condemnation action. Only Marilyn K. DuPree is involved in this appeal.

[2]The state moved for a directed verdict on compensation for any loss resulting from the change in access. The proper motion to achieve that

The following facts are undisputed. Defendant owns property abutting Highway 30 in St. Helens. Defendant had operated a restaurant on the property since 1985. In November 1988, the state notified defendant that a portion of her property would be condemned so that the highway could be widened from two to four lanes. The total amount of property condemned was 1,700 square feet. In additional, the state took a permanent eight-foot wide easement that ran the length of the property, to be used for utilities. The restaurant occupied the condemned portion of the property and was removed by the state. The remaining property was zoned "highway commercial," which permits uses that are highway oriented and commercial in nature, including restaurants.

In 1988, Highway 30 was designated an "Access Oregon Highway." Construction permits funded under the Access Oregon Program must meet certain design requirements, one of which is that access to the highway be limited. Before the highway was widened, defendant's property was accessible from the highway at two

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result was a motion for a peremptory instruction rather than for a directed verdict. *See, e.g., NW Pac. Indem. v. Junction City Water Dist.*, 296 Or 356, 372 n 1, 677 P2d 671 (1984). Nothing suggests that defendant in the trial court was misled by the improper terminology, so we treat the motion as a motion for a peremptory instruction and use that term in our opinion.

points. As a result of the widening, the state restricted defendant to one access point, a 24-foot-wide driveway, the location of which had not been determined at the time the widening project began. Under state law, defendant was required to apply for a permit from the state for that single access point.

The state determined that just compensation for the taking of defendant's property, including the value of the restaurant, the building and its trade fixtures, was $63,500. Defendant agreed that the state was entitled to take her property through condemnation but claimed that the value of the property taken was at least $90,000. At trial, defendant argued that, because the state had limited her access to her property, the value of the property had been diminished. Defendant offered evidence that she no longer could use her property for a restaurant, because that use required two points of access from the highway. Because restaurant property is of higher value than other commercial property, defendant claimed that the state was required to compensate her for the difference.

At the close of evidence, the state moved for a peremptory instruction on the issue of defendant's access to the highway. The trial court granted the motion in part, ruling that defendant could not argue that she should be compensated merely because her access to the highway had been limited. The court went on to rule, however, that defendant

could argue that, by limiting her access to the highway, the state had caused the value of her property to decline and that she should be compensated for that decline in value. The court then instructed the jury that a property owner is not entitled to unrestricted access at all points along the property but that total loss or unreasonable interference with access can reduce the market value of the remaining property, entitling the property owner to compensation. The jury returned a verdict awarding defendant $92,415. In two supplemental judgments, the court awarded defendant costs and disbursements totaling $43,917.18.

The state first assigns error to the trial court's refusal to grant a peremptory instruction ton the issue of defendant's access to the highway. At the close of evidence, the state made the following oral motion:

> "At this time the plaintiff will move for a [peremptory instruction] on the issue of access. I don't think there is a question of reasonable access that can be submitted to a jury. The case law is clear that the only obligation the State has is to provide reasonable access. Oregon law requires a permit. A permit has been obtained. There's no evidence that the landowner will be deprived of access. The access that is to be provided is reasonable as a

> matter of law, and so I think the issue of access should not be submitted at this time."

After some discussion, the trial court granted the motion, but limited that grant to the issue of whether the change in access was compensable in and of itself. The court went on to rule that the change in access was relevant to the value of defendant's remaining property and, therefore, could be addressed by defendant and considered by the jury:

> "I would at this time go ahead and grant your [peremptory instruction] on the limited basis that [defendant] is not allowed to argue to the jury that the taking of the access in and of itself is a compensable taking. *The fact that this property's highest and best use has now been changed, according to [defendant's] experts, from restaurant to other commercial property,* I will allow [defendant] to argue that point, but not just the mere taking of the access in and of itself is a compensable taking.

(Emphasis supplied.) The state argues that the trial court erred when it concluded that the jury could consider the effect of the change in access on the value of the property. We agree.

A landowner's access to a highway that abuts the landowner's property is subject to the state's authority to control and regulate the use of the highway. *See Curran v. ODOT*, 151 Or App 781, 784, 951 P2d 183 91997). Defendant does not dispute that the state acted within that authority when it restricted her access from her remaining property to the widened Highway 30. Had the state not taken any of defendant's land, but merely eliminated one of her two access points, it would not have been required to compensate her for any inconvenience, reduction in business or reduction in the value of her property. *See Gruner v. Lane County*, 96 Or App 694, 697-98, 773 P2d 815 (1989). That principle is unaffected by the fortuity that the change in defendant's access to her property was accompanied by the condemnation of a portion of it. Nothing here suggests that the remaining property could not be used for a restaurant but for the change in access. Therefore, the diminution in value caused by the change in access is not compensable.[3]

[3] Defendant relies on *Douglas County v. Briggs*, 286 Or 151, 593 P2d 1115 (1979), for the proposition that the state is required to compensate a property owner if a loss in access to an abutting highway is reduces the value of the property. That case was decided by the Supreme Court on the basis of a statute that applies to county roads and not to state highways, so it has no apparent application to this case.

Consequently, the trial court erred in denying the state's motion for a peremptory instruction to remove from the jury all consideration of the change in access on the determination of just compensation for the condemned property.

In the light of that error, the appropriate disposition would be to remand the case for a new trial. The state proposes, however, that we remand the case for entry of judgment in favor of defendant for $63,500, on the ground that the evidence establishes that that is the compensation due for the condemned property. Leaving aside the issue of compensation for the loss of access, the evidence at trial did not compel a finding that $63,500 was the compensation

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Id. at 156-57. We since have held that a restriction on access to an abutting highway imposed for regulatory purposes related to the use of the highway generally does not result in a compensable taking of access rights under Article I, section 18 of the Oregon Constitution. That means that the imposition of the restriction does not require compensation to the property owner under that provision for any loss in the value of the affected property. *Curran*, 151 Or App at 784. Defendant did not argue at trial or on appeal that any statutes require an award of compensation to her in this case, so we decide the case solely under Article I, section 18.

due for the condemned property. Hence, we cannot direct the court to enter a judgment in that amount on remand.[4]

Reversed and remanded.

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[4]Because of our disposition of the state's first assignment of error, we need not reach its second and third assignments.

APPENDIX B

Judgment*

FILED
STATE OF OREGON
[Illegible]

96 Jul 30 PM 1:05

TRIAL COURT ADMINISTRATOR
BY: /s/ J. Smiley

CIRCUIT COURT OF OREGON
COLUMBIA COUNTY

STATE OF OREGON, by and through its Department of Transportation,	)	
Plaintiff,	)	No. 95-2064
v.	)	JUDGMENT
DAMIEN B. DUPREE; MARILYN K. DUPREE aka MARILYN K. TAYLOR; KEY BANK OF OREGON, an Oregon banking association,	)	
Defendants.	)	

The above-entitled matter came on regularly for trial on June 11-13, 1996,

---

*Subsequent to this judgment, a second judgment was entered, formally dismissing Damien Dupree as a defendant.

before Judge Ted E. Grove. Plaintiff State of Oregon, Department of Transportation, appeared by and through Stephen K. Bushong, Assistant Attorney General, one of its attorneys; Marilyn K. Taylor, defendant herein, appeared by and through Gary M. Bullock, her attorney.

A judgment of Dismissal has previously been entered herein against Key Bank, defendant herein. It appears to the court and the court now finds that defendant Damien B. Dupree claims no interest in the subject property accordingly, he should be and hereby is dismissed as a party defendant.

It appearing to the court and the court now finds that the real property described in plaintiff's Complaint on file herein is necessary for public use; and

It appearing to the court and the court now finds that the plaintiff, prior to the commencement of this action and pursuant to its resolution, attempted to acquire said real property by agreement and purchase, but was unable to do so; and

A jury having been called, examined, and duly empaneled and sworn; the parties having made their opening statements; the parties having adduced evidence in support of their contentions; arguments by respective parties having been made to the jury, the jury having been regularly instructed in the law and having retired for deliberations did, on the 13 day of June, 1996, return its verdict, which verdict, omitting the title of the court and cause, is in words and figures as follows:

We, the jury, being duly empaneled and sworn to try the above-entitled case, find just compensation to be $94,215.

"DATED this 13 day of June, 1996.

/s/ Jury Foreperson

It appearing to the court and the court now finds that the amount of the verdict was more than plaintiff's tender made in writing more than 30 days prior to trial, and that defendant therefore is entitled to its costs and disbursements incurred herein.

It appearing to the court from files and records herein that on 4/15/95, the plaintiff heretofore deposited the sum of $44,500 with the clerk of the court for the use and benefit of the defendant herein; and

It further appearing to the court that plaintiff now has deposited the balance of the verdict which is over and above the said $44,500 heretofore deposited, the added sum of $49,715, plus interest at 9% per annum from 4/1/595, the date the plaintiff took possession of the property described herein, to the date of payment, and that plaintiff is now entitled to judgment herein; now, therefore,

IT IS HEREBY ORDERED AND ADJUDGED by this court as follows:

1.

That the real property hereinafter described be, and the same hereby is

appropriated for public purposes; and title to said property, together with all rights and easements therein be, and the same herein is vested in the State of Oregon, by and through its Department of Transportation, free and clear of all liens and encumbrances except as set forth herein. Said real property so appropriated is described on the attached Exhibit A.

"The use to be made of each parcel is as follows:

Title in fee simple to the property described as Parcel 1 in the exhibit A attached hereto.

Together with all abutter's rights of access between the property described as Parcel 1 in the Exhibit A attached hereto and defendant's remaining real property.

A permanent easement across the property described as Parcel 2 in the Exhibit A attached hereto, for the purpose of constructing, reconstructing, operating and maintaining slopes, landscaping, water, gas, electric and communication service lines, fixtures and facilities. Since fee simple title is not being acquired, any use may be made of the real property provided that such use shall not interfere with the

purpose of this easement or endanger the lateral support of the highway.

2.

Plaintiff shall take title of the real property described herein subject to the interest of others than the within named defendant in the following encumbrances:

"The acquisition is encumbered by and plaintiff will take subject to the interest of others than the within named defendants in the following encumbrances:

City liens, if any, of the City of St. Helens.

Unrecorded easement for underground radial tower supports.

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3.

Defendant Marilyn K. Taylor shall recover of an from the plaintiff her costs and disbursements to be entered in a separate judgment pursuant to ORCP 68.

DATED this 29th day of July, 1996.

/s/ Ted E. Grove
Circuit Court Judge

Submitted by:
Stephen K. Bushong
Assistant Attorney General
of Attorneys for Plaintiff

EXHIBIT A

File R 59012
(Ralph Bolliger and
Marilyn K. Dupree, C.P.)
WJE 06-25-92 10B-3-9
AFD Rev. 5-16-94
Parcels 1 and 2

Survey Approval Project
Section: Columbia City NCL-Warren
Highway: Columbia River Highway (Lower)
Throughway

PARCEL 1 - Fee

A parcel of land lying in Section 5, Township 4 North, Range 1 West, W.M., Columbia County, Oregon and being a portion of that property described in that Assignment of Contract to Damien B. Dupree and Marilyn K. Dupree, recorded August 4, 1987 in Book 270, Page 377, Columbia County Record of Deeds; the said parcel being portion of said property included in strip of land 47 feet in width, lying on the Northwesterly side of the center line of the relocated Columbia River Highway which center line is described as follows:

Beginning at Engineer's Center line Station 791+00, said Station being 4942.02 feet South and 2444.66 feet West of the Northwest corner of the H.M. Knighton D.L.C. No. 44, Township 4 North, Range 1 West, W.M.; thence South 36° 52' 29" West 1093.33 feet; thence on a spiral curve left (the long chord of which bears South 36° 12' 29" West 399.98 feet) 400

feet; thence on a 5729.58 foot radius curve left (the long chord of which bears South 29° 45' 51" West 1020.75 feet) 1022.10 feet; thence on a spiral curve left (the long chord of which bears South 23° 19' 13" West 399.98 feet) 400 feet; thence South 22° 39' 13" West 4184.56 feet to Engineer's center line Station 862+00.

Bearings are based upon the Oregon Co-ordinate System of 1927, North Zone.

The parcel of land to which this description applies contains 1,710 square feet, more or less.

PARCEL 2 - Permanent Easement for Slopes, Landscaping, Water, Gas, Electric and Communication Service Lines, Fixtures and Facilities

A parcel of land lying in Section 5, Township 4 North, Range 1 West, W.M., Columbia County, Oregon and being a portion of that property described in that Assignment of Contract to Damien B. Dupree and Marilyn K. Dupree, recorded August 4, 1987 in Book 270, Page 377, Columbia County Record of Deeds; the said parcel being that portion of said property included in a strip of land variable in width, lying on the Northwesterly side of the center line of the relocated Columbia River Highway which center line is described in Parcel 1.

The widths in feet of the strip of land above referred to are as follows:

Station	to Station	Width on Northwesterly Side of Center Line
791+00	792+00	55
792+00	793+00	55 in a straight line to 60

EXCEPT therefrom Parcel 1.

The parcel of land to which this description applies contains 840 square feet, more or less.

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10-28-94

APPENDIX C

Order Denying Petition for Reconsideration

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, by through its DEPARTMENT OF TRANSPORTATION,	)	Columbia County Circuit Court No. 95-2064
Plaintiff-Appellant,	)	CA A94440 (Control) CA A94890
v.	)	
MARILYN K. DUPREE, aka MARILYN K. TAYLOR,	)	
Defendant-Respondent,	)	
and	)	
DAMIEN B. DUPREE and KEY BANK OF OREGON, an Oregon banking association,	)	**ORDER DENYING PETITION FOR RECONSIDERATION AND MOTION FOR ORAL ARGUMENT**
Defendants.	)	

Respondent has moved for reconsideration of the Court's decision dated May 27, 1998, pursuant to ORAP 6.25 and for oral argument.

///

///

The petition and motion are denied.

/s/ Edward H. Warren

EDWARD H. WARREN
PRESIDING JUDGE

JUL 22 1998
DATE

C: Daniel R. Reitman
Mary H. Williams

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMIN., RECORDS SECTION, SUPREME COURT BLDG., 1163 STATE ST., SALEM, OR 97310

or15

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APPENDIX D

Order Denying Petition for Review

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON Appellant/Respondent	)	ORDER DENYING REVIEW
v.	)	
	)	CA A94440
MARILYN K DUPREE Respondent/Petitioner	)	SC S45638
DAMIEN B. DUPREE Defendant	)	
KEY BANK OF OREGON Defendant	)	

The Court has considered the

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petition for review and orders that it be denied.

DATE: October 28, 1998.

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

KULONGOSKI, J., NOT PARTICIPATING

COPIES TO:

MARY HAZEL WILLIAMS Attorney for Appellant/Respondent
DANIEL R. REITMAN Attorney for Respondent/Petitioner

This computer-generated case caption may not comply with ORAP 2.05(1) & 5.05(5).

APPENDIX E

Amended Complaint

FILED
STATE OF OREGON
[Illegible]

96 JUN 14 PM 5:20

TRIAL COURT ADMINISTRATOR
BY /s/ J. Smiley

CIRCUIT COURT OF THE STATE OF OREGON
COUNTY OF COLUMBIA

STATE OF OREGON, by and through its Department of Transportation,	)	95-2064
Plaintiff,	)	AMENDED
vs.	)	COMPLAINT
DAMIEN B. DUPREE and MARILYN K. DUPREE; KEY BANK OF OREGON, an Oregon banking association,	)	PROCEEDINGS IN EMINENT DOMAIN
Defendants.	)	

PROCEEDINGS IN EMINENT DOMAIN

Plaintiff alleges:

1

Plaintiff is a department of the State of Oregon and successor in authority to the Oregon State Highway Commission.

2.

Plaintiff has authority and jurisdiction over the Oregon state highway system. The Lower Columbia River Highway, otherwise designated as State Highway No. 2W, is a state highway and as such is part of the state highway system. The Columbia City NCL-Warren Section of this highway, located within Columbia County, Oregon, is to be widened, improved, and maintained as a throughway.

3.

Prior to commencing this action plaintiff by resolution declared the necessity of the hereinafter described acquisition and the public use to be made thereof in connection with the highway project specified in paragraph 2 hereof. The acquisition and use consist of:

> The legal description of said property is as set out in Exhibit A attached hereto and by this reference made a part hereof.
>
> The use to be made of each parcel is as follows:
>
> Title in fee simple to the property described in Parcel 1 in the Exhibit A attached hereto.
>
> Together with all abutter's rights of access between the property described as Parcel 1 in the Exhibit A attached hereto and defendants [sic]

remaining real property, except for access as provided through permit process.

A permanent easement across the property described as Parcel 2 in the Exhibit A attached hereto, for the purpose of constructing, reconstructing, operating and maintaining slopes, landscaping, water, gas, electric and communication service lines, fixtures and facilities. Since fee simple title is not being acquired, any use may be made of the real property provided that such use shall not interfere with the purpose of this easement or endanger the lateral support of the highway.

4

If a road approach or any other construction performed in connection with this project is done for the use and benefit of defendants' remaining property, and is outside the highway right of way and upon the contiguous and abutting property of the defendants, plaintiff, its employees or contractors shall have the right to enter upon the remaining property of defendants for the purpose of performing said construction work.

5

Prior to commencing this action plaintiff by resolution declared it necessary to acquire and entirely remove

the restaurant bisected by the acquisition approximately outside Highway Engineer's center line Station 791+70 and westerly of the center line of the highway; and plaintiff, in connection with this removal, declared it necessary to acquire a right of entry to go upon defendants' remaining real property contiguous to the restaurant for the purpose of moving, dismantling or otherwise disposing of the same.

6

Ownership of the acquisition described in paragraph 3 hereof is part of a contiguous and abutting larger tract of real property, title to which is claimed by defendants, Damien B. Dupree and Marilyn K. Dupree.

7

An interest in the acquisition described in paragraph 3 hereof is claimed by defendant Key Bank of Oregon, an Oregon banking association, under and by virtue of an Assignment of the Real Estate Contract executed by Ralph Bolliger to this defendant on August 3, 1987, and recorded August 4, 1987, in Book 270, Page 379, Mortgage Records of Columbia County, Oregon.

8

The acquisition is encumbered by and plaintiff will take title subject to the interests of others than the within named defendants in the following encumbrances:

City liens, if any of the City of St. Helens.

Unrecorded easement for underground radial tower supports.

9

The true value of the acquisition being appropriated by plaintiff and the damages, if any, resulting from the appropriation thereof is $63,500.00.

[The preceding paragraph so reads after amendment by interlineation, June 11, 1996, initialed "TEG".]

The above sum includes full value for the restaurant building asphalt, landscaping and the following signs and described fixtures attached to the real property, to with [sic]:

Item Number:	Item Description:
4	Cook Top
5	Stove and Oven
7	Refrigerator
9	Vent Hood
10	Deep Fryer
11	Tables and Booths
13	Sink
14	Sink
22	Fire Protection System
28	Counter Cabinet
33	Dishwasher
34	Sink and Shelf Unit
36	Fireplace Unit

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Sign No.	Description
1	4' X 9' Plastic double face sign reading "Desiree Homestyle Restaurant"
2 & 3	3' X 8' Plastic single face sign reading "Breakfast All Day, etc...."
4	21" X 55" Plastic single face reader board sign reading "Welcome to Desiree Restaurant, etc...."

10

Prior to commencing this action plaintiff attempted to negotiate an agreement to purchase the acquisition; but plaintiff is unable to reach an agreement with defendants as to the compensation to be paid for the acquisition and, therefore, prosecutes this action.

WHEREFORE, plaintiff prays that an assessment be made by a jury empaneled in this action to determine the compensation to be paid for the acquisition herein sought to be condemned and appropriated, and that upon payment into court of the compensation assessed by a jury, a judgment be given vesting in the State of Oregon, by and through its Department of Transportation, the acquisition described in paragraph 3 hereof, including the structure thereon, the equipment and fixtures that are a part of the real property, subject, however, to the encumbrances set forth in paragraph 8

hereof, and further that the plaintiff shall have a right of entry to go upon the defendant's real property for the purposes set forth in paragraph 5 hereof.

THEODORE R. KULONGOSKI
Attorney General of the State of Oregon

JOHN R. McCULLOCH, JR.
Bar No. 65076
Assistant Attorney General and Chief Trial Counsel

Of Attorneys for Plaintiff

450 Justice Building
Salem, Oregon 97310
Telephone (503) 378-6313

EXHIBIT A

File R 59012
(Ralph Bolliger and
Marilyn K. Dupree, C.P.)
WJE 06-25-92 10B-3-9
AFD Rev. 5-16-94
Parcels 1 and 2

Survey Approval Project
Section: Columbia City NCL-Warren
Highway: Columbia River Highway (Lower)
Throughway

PARCEL 1 - Fee

A parcel of land lying in Section 5, Township 4 North, Range 1 West, W.M., Columbia County, Oregon and being a portion of that property described in that Assignment of Contract to Damien B. Dupree and Marilyn K. Dupree, recorded August 4, 1987 in Book 270, Page 377, Columbia County Record of Deeds; the said parcel being portion of said property included in strip of land 47 feet in width, lying on the Northwesterly side of the center line of the relocated Columbia River Highway which center line is described as follows:

Beginning at Engineer's Center line Station 791+00, said Station being 4942.02 feet South and 2444.66 feet West of the Northwest corner of the H.M. Knighton D.L.C. No. 44, Township 4 North, Range 1 West, W.M.; thence South 36° 52' 29" West 1093.33 feet; thence on a spiral curve left (the long chord of which bears South 36° 12' 29" West 399.98 feet) 400

feet; thence on a 5729.58 foot radius curve left (the long chord of which bears South 29° 45' 51" West 1020.75 feet) 1022.10 feet; thence on a spiral curve left (the long chord of which bears South 23° 19' 13" West 399.98 feet) 400 feet; thence South 22° 39' 13" West 4184.56 feet to Engineer's center line Station 862+00.

Bearings are based upon the Oregon Co-ordinate System of 1927, North Zone.

The parcel of land to which this description applies contains 1,710 square feet, more or less.

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The widths in feet of the strip of land above referred to are as follows:

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792+00	793+00	55 in a straight line to 60

EXCEPT therefrom Parcel 1.

The parcel of land to which this description applies contains 840 square feet, more or less.

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10-28-94

APPENDIX F

Applicable Constitutional and Statutory Provisions

U.S. Const., Amend. V:

> [N]or shall private property be taken for public use, without just compensation.

U.S. Const., Amend XIV, § 1:

> [N]or shall any State deprive any person of . . . . property, without due process of law . . . .

Or. Rev. Stat. § 374.010:

> As used in ORS 374.005 to 374.095, "throughway" means a highway or street especially designed for through traffic, over, from or to which owners or occupants of abutting land or other persons have no easement of access or only a limited easement of access . . . . by reason of the fact that their property abuts upon the throughway or for any other reason.

Or. Rev. Stat. § 374.030(1):

> The Department of Transportation may so design a throughway and so regulate, restrict or prohibit access

> thereto and use thereof as to best serve the traffic for which the throughway is intended. In this connection and for such purpose the department may divide and separate any throughway into separate roadways or lanes by the construction of raised curbings, central dividing sections or other physical separations . . . .

Or. Rev. Stat. § 374.305(1):

> No person, firm or corporation may place, build or construct on the right of way of any state highway . . . . any approach road . . . . without first obtaining written permission from the Department of Transportation with respect to state highways . . . .